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TABLE OF CASES

MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW, *Respondents*.

BRIEF IN OPPOSITION FOR INTERNATIONAL UNION, UAW

In this case certain members of the UAW employed at Wisconsin Motor Corporation have challenged the Union regulation, in effect since 1944, which sets piece-rate pay ceilings for members of the Union. Evaluation of their challenge requires an understanding of the long struggle of the labor movement over incentive pay—a struggle from which was born the particular arrangement in this case, under which evils of that system are sought to be ameliorated by an upper limit on individual incentive earnings.

1. The historical opposition of labor and industrial unions to incentive pay requires no extensive documentation. See, generally, R.A. 103-108.[1] In the early years of the century and in the formative years for industrial

[1] "R.A." refers to pages of respondent's (the Board's) Appendix in the Court below.

unions, including the UAW, *hourly pay* became the rallying cry of industrial workers hard-pressed by abuse of incentive schemes for speed-up and worker demoralization. The evils of incentive pay were obvious and numerous—1) the effort to earn a decent wage became a bitter daily contest between workers for maximum personal output; 2) as piece-workers exerted themselves to achieve adequate earnings, employers repeatedly reduced the piece rate in an endless and debilitating "speed-up"; 3) older and physically less capable workers would be fired or required to subsist on limited earnings while workers with more stamina would outdistance them on the payroll; 4) all of this produced inevitable jealousies and hostilities, further dividing industrial workers whom many employers desired at all costs to forestall from unity and union organization.

In the 1930s, when organization among industrial workers was achieved on a wide and significant front, the evils of the incentive system were further revealed by the "Stakhanov Movement" in Soviet Russia. In 1935, in an effort to increase industrial output, the Soviet government made a national hero of Aleksey Stakhanov, a coal miner who had achieved an unprecedented increase in his daily mining output.[2] Stakhanovism symbolized to industrial unions in other nations the worst excesses of the speed-up squeeze. At the very first UAW Constitutional Convention held in 1935, there was heard the complaint against the American counterpart of the Stakhanovite method. During

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[2] *"Aleksey Stakhanov . . . [was] a coal miner in the Donets Basin, whose team succeeded in increasing its daily output sevenfold. The Soviet Government, anxious to speed up fulfillment of the Five-Year Plan, encouraged the Stakhanov movement, and Stakhanovite workers received high pay and other privileges. Whether it was spontaneous or not, the Stakhanov movement gained wide following . . . It has been widely criticised outside the USSR as another form of the speed-up system, fought by labor unions throughout the world."* Columbia Encyclopedia, 2d Ed., p. 1880.

the debate on Resolution No. 225, one of whose five points was "*abolition of speed-up and piece work,*" the following colloquy ensued.:

> "Delegate Marshall, 93: There is something else I would like to state. Down in Kansas City we have the piece work system. They take the fastest man on the job and they base the piece work rate on that fastest man, and I think that is unjust to the entire crew. It makes it impossible for the men to maintain the standard of wages they should be able to maintain . . .
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> "President Martin: That is included in the abolition of the piece work system."

2. In the late 1930s the UAW met with success in its efforts to replace incentive pay with hourly wages. But after Pearl Harbor the national interest in maximum defense production was urged in some quarters to support renewed use of incentive pay. This gave rise to grave concern within the Union's ranks, reflected in the "majority report on incentive pay" adopted by the UAW's Eighth Constitutional Convention in October of 1943:

> "Whereas: The workers of the automobile industry, without submitting to the dangers and injustices of piece-work plans, have increased the productivity of the auto industry to the highest level in the history of this or any other industry; and
>
> "Whereas: Despite these facts the Automotive Council for War Production, representing management, management spokesmen in the War Production Board, spokesmen outside and inside the union have within the last year inaugurated a drive for the introduction of piece-work systems or so-called incentive plans in the automotive and aircraft industries . . .
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> "The International Union of the UAW-CIO reiter-

ates emphatically its traditional opposition to the introduction of incentive or piece-work plans in the plants within our jurisdiction where such plans do not exist. The International Union will continue to leave to the autonomy of Local Unions the continuance of piece-work systems in keeping with the minimum standards set forth by the Columbus Board meeting.

"This Convention of the UAW-CIO takes a firm position against extension of incentive pay plans because we believe that piece-work will neither bring our Nation maximum war production nor provide workers with an adequate annual wage.

"Piece-work will result only in further aggravating the dislocation and unbalancing of production schedules, resulting in layoffs, unemployment and dissipation of our manpower. Piece-work systems would have the result of further intensifying the problem of wage inequalities and differentials, will block the union's efforts to establish an industry-wide wage agreement based upon equal pay for equal work, and will further demoralize workers who are, at present, getting less money for doing the same work. Piece-work systems would reintroduce the old system of speed-up, in which the worker is robbed of higher earnings through management's using every insignificant engineering change or pretext to cut rates . . ."

Upon the approval of incentive rates by the War Labor Board, UAW locals sought to ameliorate the evils of incentive pay which had so long burdened industrial workers and interfered with the harmonious relationship of union members. In 1944 the workers at Wisconsin Motor Corporation, which had substantial numbers of its workers on incentive pay, determined that a formal ceiling should be placed upon piece-work earnings. The reasons for this

action are described in testimony by witness Norman Wold, who was a leader of the local union in 1944 (Tr. 553):

> "We talked about well, what are we going to do. We have got to do something. You know, in the shop there around Thanksgiving Day or near Christmas, why there was layoffs and the fellows were getting older. Some of the fellows were getting older and the young fellows would come in and they would push, push, push, push, so we wanted to see that this labor state keep as many fellows working as we possibly could, and we know if we put this thing on there it would provide for at least a few more fellows to stay at work. So we thought the thing over. I'd say that it wasn't any board of directors. It was the group. They voted on it at the union and they have had many a chance over the years to kick it out or put it in or whatever. In fact, it has been brought up and I'd say ninety eight per cent of the fellows right today are 100 p[illegible] cent for this ceiling because it provides jobs. It provides for not too much pressure working piece work fellows. I don't know whether you have ever done that or not; but there is always a pressure, a pressure all the time. You want to make out. You want to make as much as you can . . ."

A regular membership meeting of the local union resolved on March 19, 1944, that "if, and when, the proposed machine base rates in the contract are approved by the W.L.B., the Union take steps to place a ceiling on piece work earnings. That a limit of 10¢ per hour over and above the proposed machine base rates be included in the next contract" (R. Exh. 9). A month later it was moved and carried at a membership meeting that "men turn in no more than 10¢ per hour over and above the new machine rates" *(ibid)*. In 1946, the membership voted that penalties be

imposed in the form of fines for violation of the prevailing piece-rate ceilings *(ibid)*.

3. Since its inception the Company has acquiesced in the operation of the Union piece-rate pay ceiling; it has incorporated in periodic agreements with the Union the level at which the piece-rate ceiling would be set;[3] and it has taken no disciplinary action against any piece-rate employee who adheres to the incentive ceiling (R.A. 50-52, 95-96). The Company, however, has not itself enforced the ceiling, and has regularly paid every worker's validated earning claim, even if known to exceed the applicable ceiling. On the basis of the entire evidence the Trial Examiner found that the Union's incentive ceiling program "is the product of hard bargaining" in periodic negotiations between the Union and the Company (R.A. 52).

The Trial Examiner also set forth in the following terms the considerations which have led the Union to establish the incentive pay ceiling (R.A. 53):

> "... the Union justifies the ceiling rule on the basis of apprehensions, which, as the literature on the subject would indicate, have their roots in industrial experience with incentive plans of earlier vintage, some of which have been acknowledged by management spokesmen as having been reasonably grounded. ... These include expressed concern that a stepped up pace could result in: (a) employees working themselves out of jobs, (b) usher in the evil of 'stakhanov-

[3] For instance, the 1953 contract between the Union and the Company (G.C. Exh. 17) provided that the previous agreement be modified so as to "Increase the ceilings on all piece work jobs a total of thirteen cents (13¢) per hour effective July 1, 1953 over the ceilings on piece work jobs in effect on April 30, 1953." Similarly, the strike settlement agreement of August 14, 1956 between the Union and the Company provided (G.C. Exh. 22) that "The ceilings on earnings is to be raised ten cents (10¢) per hour above the general increase of 1-1-56 and the ten cents (10¢) of 5-1-56 or a total of 23¢ per hour."

> ism', under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced, (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances."

Concerning the Union's "legitimate interest" underlying the piece-rate ceiling regulation, the Examiner (R.A. 96) cited and approved authorities demonstrating "that the setting of production limits among pieceworkers is hardly new in our industrial life, and that it has its roots in experience under piecework and incentive plans giving rise to apprehensions, reasonably grounded, with which such a practice is designed to cope."

4. The Decision of the Labor Board accepts the findings of the Trial Examiner (Pet. p. 14a). In addition, the Board emphasizes the periodic bargaining between the Union and the Company over the incentive pay ceiling applicable to the Union's members, which the Company has accepted "as forming an important element of its negotiated wage structure."[4] The Board reviews the Congressional history

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[4] As the Board found (Pet. p. 16a): "Although the Company does not consider itself bound by the rule, and at various times during negotiations has unsuccessfully sought to induce the Union to drop the ceilings, the Company nevertheless as a practical matter has accepted the ceilings as an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure. So far as appears, the Company has never sought to discipline any of its employees for adherence to the Union's ceiling restrictions. The Company uses the ceilings in computing wages and evaluating jobs. Ceilings have also played an important role in the negotiation of collective-bargaining agreements between the Company and the Union. Thus, in 1953, one of the Company's proposals was that the ceilings be increased at least 10 percent. The contract that year made provisions for a 13 cents per hour

and finds no evidence "that Section 8(b)(1)(A) was intended to interdict the conduct under examination" (Pet. p. 18a).

5. The majority in the Court below finds this Court's decision in *Labor Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, dispositive in favor of an affirmance of the Board's ruling. In reaching that conclusion the Court does not purport to apply *Allis-Chalmers* in any rubber stamp fashion. On the contrary, the opinion carefully reviews and approves the Board's finding that "ceiling rules derive from a legitimate, traditional interest in union objectives", having to do with the effect of unrestricted incentive pay upon employment security, employee morale, and employee health (Pet. p. 9a). The Court concludes that the union rule here in issue "has a rational basis, and we cannot say that it was not reasonably calculated to achieve a permissible end" (Pet. p. 10a). Thus, as an instance of a legitimate union rule enforced by a reasonable disciplinary fine, this case does not differ in any significant respect from the situation before this Court in *Allis-Chalmers* just two terms ago.

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increase in ceilings. The 1956 strike settlement agreement provided for another increase in ceilings. In 1959, the Company made no request for the elimination of ceilings, but only requested that they be increased 10 cents.

"Moreover, while abstaining itself from enforcing the ceiling rule, the Company voluntarily aids and cooperates with the Union in the administration of the rule. Thus, the Company joins in the 'banking' procedures by making the necessary bookkeeping entries. The Company also allows the ceilings to be posted on its bulletin boards. And it assists the Union in policing enforcement of the rule by making available to the Union the members' production records and allowing the union stewards to inspect such records on Company time without loss of pay."

Reason for Denying the Writ: The Question Presented Was Definitively Resolved by the 1966 Allis-Chalmers Decision.[5]

1. The governing standard for decision in the present case was announced by this Court in *Labor Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175. We need not belabor here the general applicability of that precedent to claims that union fines violate Section 8(b)(1)(A) of the National Labor Relations Act. As demonstrated in the majority opinion below, and in the Opposition for the National Labor Relations Board, in *Allis-Chalmers* this Court held that fines enforcing legitimate organizational norms upon a union's own members are not within the area of the Labor Board's statutory jurisdiction. That holding is now controlling in union fine situations and Section 8(b)(1)(A) can have no application unless the challenged union rule is entirely "ultra vires" and beyond the area of the union's legitimate concern. Far from being outside the area of the union's legitimate interests, piece-rate earnings ceilings are squarely within the union's legislative judgment, reflecting concern for protection of workers and union members from the evils of unrestrained incentive pay.

2. In the area of wages, hours and working conditions,

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[5] We deem it our responsibility to suggest that the Petition for Certiorari in this case was filed out of time. Rule 23 of the Court below provides that, except in the case of a decree enforcing the order of an administrative tribunal (this was an appeal by petitioners rather than an enforcement action by the Board), the "judgment shall be entered on the date the opinion is filed." The opinion of the Court below (Pet. p. 3a) was filed on March 5, 1968 and the judgment was duly filed on the same day (see Appendix, *infra*, p. 15). It is true that on April 16, 1968 a decree was issued by the Court below (Pet. p. 1a), but it was in terms practically identical with the judgment of March 5. Such a duplicate judgment does not toll the 90-day period for filing a petition for certiorari. See *Department of Banking* v. *Pink*, 317 U.S. 264; *Cole* v. *Violette*, 319 U.S. 581. Under these circumstances it appears that the governing date for computing the 90 days is March 5, 1968, when the judgment issued, and that the Petition filed on July 6, 1968, was four weeks late.

the union has indisputable power to make binding judgments concerning the interests of all employees it represents, and its discretion honestly exercised is not subject to judicial review.[6] In the exercise of that statutory discretion it has been the consistent judgment of industrial unions—

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[6] *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330. As this Court emphasized in *Allis-Chalmers* (388 U.S. at 180), national labor policy:

> "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents * * *' *Steele* v. *Louisville & N.R. Co.* 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy.' 'The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.'"

It is noteworthy that in the present case collective bargaining is actually involved in the establishment and operation of the piece-rate ceiling. The Labor Board found that the Company has periodically bargained with the Union the level of its piece-rate ceilings and has "recognized the ceilings as forming an important element of its negotiated wage structure" (*supra*, p. 7). This, among other things, distinguishes *Associated Home Builders* v. *National Labor Relations Board*, 352 F. 2d 745 (C.A. 9, 1965), which petitioners and amicus Illinois Manufacturers Association purport to find in conflict with the decision below. But in *Associated Home Builders* the union rule in question was established after the execution of the collective bargaining agreement between the company and the union and was "precisely contrary to the provisions of that contract" (352 F. 2d at 751). Furthermore, the Court will look in vain for any holding as to the scope of Section 8(b)(1)(A); all the Ninth Circuit did was to remand to the Board for consideration of possible violations of Section 8(b)(3) and 8(d). If further distinctions were needed, the situation at bar does not involve a limit upon production as did *Associated Home Builders;* as the Court there stated, "the rule is not directed merely to the employees; it has a direct impact upon the employer" (352 F. 2d at 750).

reflected in the annual negotiation of thousands of collective bargaining agreements throughout the nation—that rather than incentive pay the workers' best interest is met by hourly pay which discounts entirely individual differences in employee productivity. See 2 BNA Collective Bargaining Negotiations and Contracts 93:6-7 (Aug. 12, 1965). A Labor Department study has found that *73% of production and related workers employed in the nation's manufacturing industries* are paid on an hourly wage rather than a piece-rate basis. U.S. Bureau of Labor Statistics, Dep't of Labor, *Extent of Incentive Pay in Manufacturing*, Monthly Labor Review (May 1960).

Thus the union has statutory power by negotiation of straight hourly wages to discount entirely an individual employee's high productivity; and if, as is equally clear, the majority-chosen bargaining representative may do so even for employees who have never voted for or joined the union, then the piece rate earnings ceiling is a *doubly a fortiori* case of permissible union regulation. First, at Wisconsin Motor Corporation the Union has agreed with the employer that half of the work force shall be compensated on piece-rate rather than hourly basis, and in this respect petitioners, who are in piece-rate jobs, are already permitted pay increments based on productivity denied their fellow employees on hourly wages. Second, petitioners joined the Union though they did not have to do so under the NLRA (see 388 U.S. at 197, n. 37; R.A. 65-66) nor under the "service fee" option arrangement between the Union and the Company; accordingly, unlike the ordinary employees required as such to accept union determination in the negotiation of their wages, petitioners made their own decision to belong and to accept union rules, including the piece-rate ceiling rule. Surely in the area of wage rates majority rule is not less binding

on those who opt for it within the union than on those who have it thrust upon them merely as employees for whom the union is the statutory bargaining representative. Thus it seems clear that a union empowered altogether to *deny* productivity pay to workers who never espoused the union, may set a *maximum* on the productivity pay of its *own members.*

Moreover, unions are even more concerned to prevent excessive productivity-pay-differentials among their own members than among workers whom they represent merely as members of the bargaining class. Excessive pay differentials which arise in the absence of a piece-rate ceiling often cause rivalry and bad feeling among workers—*particularly in the ranks of older employees unable to work at a pace comparable to young men in their teens and twenties.* Even in the plant the resulting tensions between workers are bad, though perhaps not intolerable. But within the union the same workers are related not merely as employees of the same employer; they are politically and socia 'y associated with each other to promote mutual interests. There the hostilities engendered by unrestricted productivity pay create a problem of real concern for the union as an operating association where the "generation gap" is a cause of constant friction and the added tension of large pay differentials favoring the younger over the senior member is much to be avoided.

In sum, the Trial Examiner, the Board, and the Court below, cannot be faulted in their conclusion that reasonable and tangible premises support the union rule here in issue. If *Allis-Chalmers* leaves any room for finding in some extreme case that discipline of members violates Section 8(b)(1) because the underlying union rule is unrelated to any arguable union interest, surely this case presents only a proper exercise of union authority directly re-

lated to the common interest of the members.[7] From every point of view the present case is within the *Allis-Chalmers* holding that Section 8(b)(1)(A) "assures a union freedom of self-regulation where its legitimate internal affairs are concerned" (*Labor Board* v. *Industrial Union of Marine Workers*, 36 U.S.L. WEEK 4491, 4492.)[8]

5. Since this case raises essentially the same issue resolved in *Allis-Chalmers*, the petitioners are in effect requesting this Court to reconsider that ruling. But nothing has occurred since *Allis-Chalmers* which would warrant reopening the issue of statutory construction so recently and definitively adjudicated. On the basis of ample legislative evidence, this Court concluded that within areas of genuine concern Taft-Hartley provisions were not intended to restrict union discipline. If the Congress desires to intrude further under the National Labor Relations Act

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[7] It is also pertinent that the earning ceiling rule here in issue is far less severe in its economic effect than was the "no strikebreaking" rule in *Allis-Chalmers*. The ceiling rule does no more than to hold to a reasonable pay maximum workers who would otherwise outdistance others on the payroll because of their exceptional working speed and endurance. By contrast, the *Allis-Chalmers* rule barred *any* remuneration at all to union members during a strike, and even subjected them to the risk of the employer's filling their positions with permanent replacements. Compared to the impact of that rule, the impact of the incentive pay ceiling at Wisconsin Motor Corporation is modest indeed.

[8] Both petitioners and the Illinois Manufacturers Association as amicus curiae appear to place some reliance, albeit minimal, on the *Industrial Union* case, amicus contending that it "is a clear indication of a limit beyond which a Union may not go . . ." (Amicus Br. p. 9). But it is a far cry from a collectively-bargained union rule setting a maximum on the productivity pay of union members to the expulsion from the union of one who has resorted to his legal remedies before the NLRB. As the Supreme Court said in the *Industrial Union* case (36 U.S.L. WEEK at 4494):

> ". . . where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not grounds for expulsion from a union."

What is significant for present purposes is not *Industrial Union's* refusal to allow expulsion for resort to the Labor Board, but its reaffirmation of *Allis-Chalmers*.

into the area of union affairs it is free to do so.* But unless and until Congress acts further, there is no occasion for this Court's reconsideration of the statute's impact upon matters of union concern.

Conclusion

It is respectfully submitted that the Petition for Certiorari should be denied.

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*This Court's decision in *Allis-Chalmers* has recently survived a Congressional attack led by Senator Ervin. His proposed substitute for the 1968 Civil Rights bill (H.R. 2156), would have prohibited interference with any person's right "to pursue his employment by . . . any private employer engaged in interstate commerce . . ." The Senator supported this proposal by a frontal assault on the *Allis-Chalmers* decision (114 Cong. Rec. S 180-181). On February 6, 1968 a motion to table the amendment was passed by a vote of 54-29 (114 Cong. Rec. S 980). On March 8 (114 Cong. Rec. S 2462) Senator Ervin unsuccessfully sought to attach to the pending measure another similar provision which would have amended Section 8(b)(1)(A) to forbid union fines. (Citations to Cong. Rec. are to daily edition).

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, March 5, 1968.

Before Hon. WIN G. KNOCH, *Senior Circuit Judge,* Hon. LUTHER M. SWYGERT, *Circuit Judge,* Hon. WALTER J. CUMMINGS, *Circuit Judge.*

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEPANEC and GEORGE KOZBIEL, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby DENIED in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.